IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,

Plaintiffs,

v. **Civil Action No.: 3:06-cv-224-WKW**

SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,

Defendant.

PLAINTIFFS' MEMORANDUM BRIEF
IN SUPPORT OF SUMMARY JUDGMENT

COME NOW Macon County Investments, Inc. ("MCI") and Reach One, Teach One of America, Inc. ("Reach One, Teach One") and hereby file this Memorandum Brief in Support of Summary Judgment. MCI and Reach One, Teach One state the following:

I. STATEMENT OF THE CASE

1. This action was filed on March 10, 2006. MCI and Reach One, Teach One allege that the Defendant's rules and regulations for conducting bingo gaming in Macon County are arbitrary and capricious and serve no purpose other than to deny the Plaintiffs equal protection under the laws.

2. MCI and Reach One, Teach One demanded the following relief:

A. Preliminary and permanent injunctive relief prohibiting the Defendant Sheriff and his respective officials, agents, employees, and representatives from further operating under the First or Second Amended Rules.

B. Preliminary and permanent injunctive relief compelling the Defendant Sheriff and his respective officials, agents, employees, and representatives to grant the application of Reach One, Teach One and MCI's application for a Class B Bingo License in Macon County.

C. A declaratory judgment that the Defendant Sheriff's differential treatment towards the Plaintiffs is a denial of equal protection and that his actions twice amending the Original Rules and delaying the application of the Plaintiffs was and remains arbitrary and capricious.

D. A declaratory judgment from this Court that the First and Second Amended Rules are arbitrary and capricious and thereby null and void.

E. Awarding Plaintiffs their reasonable costs and expenses herein, including reasonable attorneys' fees;

F. Any and all further relief that the Court deems necessary and proper to effect justice in this cause.

3. The Defendant moved to dismiss the Plaintiffs' Complaint based upon the theory that the claims lacked standing and that the Plaintiffs' Equal Protection Claim failed to state a claim upon which relief could be granted.

4. The Court denied the Defendant's Motion to Dismiss and instructed the Plaintiffs to file an Amended Complaint to cure any standing defects as it related to MCI.

5. The Plaintiffs filed a First Amended Complaint in accordance with the Court's Memorandum Opinion. The Plaintiffs sought the same relief as requested in the Original Complaint.

6. The Defendant moved to dismiss the Amended Complaint based upon the same grounds asserted against the Original Complaint. The Court denied the Defendant's Motion to Dismiss the First Amended Complaint.

7. Trial is set in this case for October 2, 2007. Based upon the discovery taken and the pleadings filed to date, the Plaintiffs now move for a summary judgment.

II. STATEMENT OF THE MATERIAL UNDISPUTED FACTS

1. The State of Alabama allows for the Amendments to its Constitution which only affect a certain County. Through this type of Amendment, or local legislation, the Alabama Legislature authorized the operation of Bingo facilities in Alabama.

2. The Legislature for the State of Alabama ratified Amendment 744 to the State's Constitution. This Amendment governs the operation of Bingo gaming in Macon County. The Amendment provides, in pertinent part, that "the operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County." *See* Exh. 1, Ala. Const. (1901) Amend. 744. Further, the Amendment provides that the non-profit organization may enter into an agreement with an individual, firm, or a corporation to operate the facility.

> "A nonprofit organization may enter into a contract with any individual, firm, association, or corporation to have the individual or entity operate bingo games or concessions on behalf of the nonprofit organization. A nonprofit organization may pay consulting fees to any individual or entity for any services performed in relation to the operation or conduct of a bingo game."

Ala. Const. (1901) Amend. 744 (4)

The Legislature placed no limit on the number of licenses that can be issued or the number of facilities that can be authorized to operate gaming in Macon County.

3. Amendment 744 also states that the Sheriff of the County shall be responsible for promulgating the rules regarding the licensing and operation of the Bingo facilities. The Defendant Sheriff promulgated "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" in December of 2003. *See* Exh. 2, Original Rules.

4. At that time, the Rules stated that any non-profit organization could make an application for a Class B Bingo license. Additionally, the non-profit could operate its bingo

games at a qualified location. To be a qualified location, the facility, including the land, building and improvements, had to be at least $5 million in value. Exh. 2, Original Rules, Section 1(j) and Section 4(a).

5. According to the Sheriff, the Macon County Greyhound Park ("referred to as Victoryland in the deposition") was the only location in Macon County that could meet the requirements of a qualified location. Exh. 3, Sheriff Depo., p. 73, ln. 16-22.

6. When asked specifically about why he set the value of a qualified location at $5 million, the Sheriff responded that he did not want trailers to be used to conduct gaming. However, he could not state what made $5 million the standard for the value of the qualified location. Exh. 3, Sheriff Depo., p. 67-69.

7. The Defendant Sheriff has authorized bingo at only one qualified location under these rules. That facility is the Macon County Greyhound Park.

8. Six (6) months later, on June 2, 2004, the Defendant Sheriff promulgated the First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama. Exh. 4, First Amended Rules.

9. The First Amended Rules provided that no Class B licensee can be authorized to operate bingo at any qualified location unless a minimum of fifteen (15) applicants first obtain a license to operate at that location.

10. The First Amended Rules also increased the requisite value of a qualified location from $5 million to $15 million.

11. In his commentary to the First Amended Rules, the Sheriff generally stated that the rules were being amended to "maintain, protect and enhance the integrity of , the viability of and the economic benefits derived from, bingo games for the eligible nonprofit organizations in

Macon County that offer material charitable and educational purposes in Macon County, Alabama." Exh. 4, First Amended Rules, Commentary.

12. The Sheriff stated in his deposition that the 15-applicant minimum was enacted to prevent any abuse that would occur from an operator conducting bingo with just one charity. Exh. 3, Sheriff Depo., p. 148, ln. 4-12. However, the Sheriff could not point to any events or incidents which led him to believe that bingo would be abused in that manner. Exh. 3, Sheriff Depo., p. 148-149, ln. 21-14.

13. Additionally, the Sheriff stated that the number 15 had no real significance.

Q: Okay, if you don't mind, what's determinative about 15 charities? Why not five? Why not ten? Why not 25?
A: This was – that was a number I decided on.
Q: You just woke up one morning and 15 hit the head?
A: Uh-huh (affirmative).

Exh. 3, Sheriff Depo., p. 149-150, ln. 20-4.

14. No additional facilities were authorized to operate as qualified locations under the First Amended Rules.

15. The Defendant Sheriff issued a Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama. The Second Amended Rules stated that at no time shall there be more than sixty (60) Class B Licenses in Macon County, Alabama. Exh. 5, Second Amended Rules, Section 2.

16. The Sheriff testified that one of the reasons why this change was made was to comply with the Alabama Attorney General's policy to limit bingo gaming activities in Macon County. Exh. 3, Sheriff's Depo., p. 191-192, ln. 2-20. However, the Attorney General articulated no such policy. Exh. 6, AG's Findings re: Bingo; Exh. 3, Sheriff's Depo., p. 194, ln. 13-16.

17. The other reason was to allow the Sheriff's Department to be able to better manage bingo in Macon County.

18. At the time of the Sheriff's deposition, approximately 62 Class B licenses had been issued, with 60 of those being active. All active licensees are conducting bingo at one qualified location -- Macon County Greyhound Park. Exh. 3, Sheriff's Depo., p. 203, ln. 6-12; p. 214-215, ln. 19-2.

19. The Sheriff admits that through his rules, he has effectively limited bingo gaming in Macon County to operate solely at the Macon County Greyhound Park. Exh. 3, Sheriff's Depo., p. 216, ln. 2-8; p. 227, ln. 4-12.

20. The Sheriff attributes much of the drafting of the rules to his attorney or a collaboration with his attorney. Exh. 3, Sheriff's Depo., pp. 62-63, ln. 18-20; p. 150, ln. 6-17. The Sheriff admits that he knew that his attorney was also representing the Macon County Greyhound Park at the same time that he was being advised on the rules and regulations for bingo gaming in Macon County. Exh. 3, Sheriff's Depo., pp. 273-274, ln. 11-10. The Sheriff also acknowledges that he believes that one of his attorneys is also a stockholder, investor, member or partner of the Macon County Greyhound Park. Exh. 3, Sheriff's Depo., p. 280, ln. 12-19.

21. One of the first nonprofit organizations to receive a Class B bingo license in Macon was the Tuskegee Human and Civil Rights and Multicultural Center. Exh. 7, Multicultural Center License. This organization is owned by the Sheriff's attorney's immediate family member. That charity operates bingo at the Macon County Greyhound Park.

22. On or about July 25, 2005, Reach One, Teach One and MCI filed a joint application for a Class B Bingo license in Macon County using the Defendant Sheriff's required Application for Bingo License pursuant to the Second and Restated Amended Rules previously

referenced herein. Exh. 8, Plaintiffs' Application. As required by these rules and Amendment 744, Reach One, Teach One served as the non-profit organization application. Additionally, in accordance with these rules, MCI joined the application as "a member or a person who shall be in charge of or have control over the operation or promotion of bingo games" and was designated as the surety and guarantor underwriting the bingo games. Exh. 5, Second Amended Rules, Section 4(c)(4)-(6); Exh. 8, Plaintiffs' Application.

23. Pursuant to the applicable instructions to the Bingo License Application, the Executive Director of Reach One, Teach One and the President and other members of MCI completed personal data forms and consented to background checks as applicants for a Class B Bingo license. Exh. 8, Plaintiffs' Application.

24. Further, the application included a letter from the general contractor attesting that the proposed facility would have a projected cost over $16 million. Exh. 8, Plaintiffs' Application.

25. MCI and Reach One, Teach One filed the joint application with the office of the Defendant Sheriff, and the Defendant Sheriff acknowledged the receipt of the same.

26. Although the Defendant Sheriff has made some verbal assurances that the application would be granted, the Defendant Sheriff has not issued a license to the Plaintiffs.

27. Based upon those verbal assurances, the MCI has contracted to purchase land for the facility and to begin construction of the facility and has negotiated financing to purchase games for the operation of the facility.

III. STANDARD OF REVIEW

"A motion for summary judgment tests the sufficiency of the evidence...when a motion for summary judgment is made and supported as provided in Rule 56, the nonmovant may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Proof by substantial evidence is required." *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 675 (Ala. Civ. App. 1995). Here there is no genuine issue of material fact. If there is no genuine issue of material, then the moving party is entitled to a judgment as a matter of law. *Sizemore*, 671 So. 2d at 675. There is no genuine issue of material fact present in this case, and MCI and Reach One, Teach One are entitled to summary judgment.

IV. ARGUMENT

Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 536, 53 S.Ct. 481, 485 (1933). "The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose.... The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Ga. Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir.1998).

The Sheriff has promulgated rules that deny Reach One, Teach One and MCI the opportunity to engage in bingo gaming in Macon County. The enabling legislation for bingo gaming in Macon County, Amendment 744 to the Alabama Constitution, does not place any limits on the number of Class B licenses that can be issued and the number of facilities where bingo can be operated in Macon County. Nonetheless, the Sheriff has created a monopoly in favor of a private corporation for the operation of bingo gaming in Macon County. Further, the Sheriff has placed limitations on the number of non-profit organizations so that no other non-profit organization can even obtain a Class B bingo license at this time.

The Sheriff has violated the Plaintiffs' right to equal protection under the laws by overextending his rule-making authority under Amendment 744. The Sheriff has not articulated a rational basis for his actions. Further, the reasons given by the Sheriff are not reasonably related to a legitimate government interest. MCI and Reach One, Teach One are entitled to summary judgment and should be granted the relief requested in its First Amended Complaint.

A. THE SHERIFF HAS OVEREXTENDED HIS RULEMAKING AUTHORITY BY CREATING A MONOPOLY

Amendment 744 of the Alabama Constitution enables the Sheriff to promulgate rules to regulate bingo gaming in Macon County. The statute gives some general requirements that the Sheriff must ensure compliance. The Amendment prohibits anyone under the age of nineteen (19) from operating or playing bingo. The Amendment also requires any non-profit charity seeking a license to have been in existence for at least three years prior to making an application.

"A governmental entity does not have a legitimate purpose to regulate beyond the authority conferred by its enabling legislation." *Seventh Street, LLC v. Baldwin County Planning and Zoning Com'n*, 172 Fed.Appx. 918, 921, 2006 WL 531446, *2 (11th Cir. 2006). Regulations outside of this authority cannot be reasonably related to a legitimate governmental purpose. *Seventh Street*, 172 Fed. Appx. at 921. The Sheriff admits that he created the rules with the Macon County Greyhound Park in mind, and that no other entity in Macon County would be able to fit the requirements articulated in the rules. The Sheriff admits that he bingo gaming cannot be operated at any other facility in Macon County but the Macon County Greyhound Park. The Sheriff also admits that a non-profit organization wanting to obtain a Class B bingo license would have to wait until at least 15 of the non-profit organizations in a contractual agreement with the Macon County Greyhound Park fail to be licensed. The Sheriff acknowledges that the Macon County Greyhound Park has twenty-year contracts with the non-profit organizations to operate bingo gaming.

The enabling statute allows ***any*** non-profit organization to contract with ***any*** individual or firm to perform services in the operation of bingo for it. The Amendment places no limitations on the number of non-profit organizations which may be licensed in Macon County. The Amendment does not place a limitation on the number of facilities at which bingo gaming may be operated. The Amendment does not anticipate that the number of licensed non-profit organizations would be capped in such a way that one private corporation will be the sole operator of bingo in Macon County. To that end, the Amendment does not anticipate the promulgation of rules which would require a company to build a $15 million structure before it qualify as a location where bingo could be operated. Essentially, the Amendment does not authorize the Sheriff to structure a monopoly within the Macon County Greyhound Park as he has done with bingo gaming.[1]

The Sheriff has exceeded his authority under Amendment 744 and has thus violated the Plaintiffs' right to equal protection under the laws of the State of Alabama. Therefore, summary judgment should be granted in favor of the MCI and Reach One, Teach One.

B. THE SHERIFF'S ARTICULATED REASONS FOR DISCRIMINATION ARE NOT REASONABLY RELATED TO A GOVERNMENT INTEREST

[1] As further evidence of an intentional monopoly, the rules were drafted by and with the assistance of parties who have a private interest in the economic benefits of bingo gaming in Macon County. The Sheriff and the Macon County Greyhound Park are both represented by the same law firm; one of the Sheriff's attorneys is either a stockholder, investor, member or partner of the Macon County Greyhound Park; and one of the 60 licensed nonprofit organizations is owned and operated by an immediate family member of the Sheriff's attorneys. Not surprisingly, the Sheriff's rules create a monopoly, and a monopoly in favor of those private interests. Given these multiple instances of conflicts and self-dealing, it cannot be held that the Sheriff's rules and regulations are reasonably related to a legitimate government interest. Therefore, summary judgment should be granted in favor of MCI and Reach One, Teach One.

The United States Supreme Court has held that "the [regulator] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985). A distinction is deemed to be arbitrary and irrational when there is an inadequate or nonexistent connection between the classification and purpose. The United States Supreme Court has invalidated discriminatory classifications for these reasons. *Alleghany Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344-45, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985); *Williams v. Vermont*, 472 U.S. 14, 25-27, 105 S. Ct. 2465. 86 L. Ed. 2d 11 (1985).

In *Lindsey v. Normet*, the state argued that requiring tenants who challenged eviction proceedings to post bond twice the amount of rent was done to protect losses incurred by the landlord. The Court held that this requirement was unrelated to actual rent accrued or to specific damage to the landlord. Additionally, the requirement imposed a substantial barrier to appeal faced by no other civil litigant. The Court concluded that there was "no reasonable relationship to any valid state objective" and that the requirement was "arbitrary and irrational."

Similarly, in *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620 (1996), the United States Supreme Court held that a Colorado statute prohibiting any governmental action to protect persons based upon their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" was so far removed from the state's cited interest of respecting freedom of association and conserving resources in fighting discrimination that it was "impossible to credit them." The Court further stated that it could not hold that the statute served some legitimate purpose. Instead, the statute was far-reaching and was not rationally related to a legitimate governmental purpose. *Romer*, 517 U.S. at 635.

In this case, the Sheriff's articulated reasons for promulgating discriminatory rules are not reasonably related to a legitimate government interest. The Sheriff states that requiring applicants to have a $5 million (later amended to $15 million) structure in place before a facility can be deemed a qualified location serves the purpose of preventing trailers from being erected and demonstrating a substantial commitment to Macon County. Applicants can surely build suitable structures for less than $5 million and $15 million. Further, the Sheriff could verify the value of a proposed facility before construction is complete. With their application, MCI and Reach One, Teach One provided evidence that the structure would be valued at least $15 million once completed. It is unreasonable to require an applicant to build a $15 million structure and hope that they will be granted a license. Similar to the legislation in *Lindsey*, this requirement imposes a substantial barrier to applicants seeking licensure pursuant to Amendment 744. The Sheriff admits that there was no rhyme or reason to the $5 million and $15 million amounts to determine the level of commitment and investment to Macon County. This requirement is arbitrary, and it cannot be held to have a rational relationship to any governmental interest.

The Sheriff states that requiring at least 15 nonprofit organizations to apply before bingo can be operated a qualified location was done to allow more nonprofit organizations to gain the benefits from bingo in Macon and to prevent a qualified location from using 1 nonprofit as a "front" to operate bingo. However, the Sheriff could not explain why the number 15 was chosen. He could not articulate any facts which led him to believe that bingo would be abused in such a manner. Clearly, this is an arbitrary requirement imposed by the Sheriff which serves no legitimate government interest. Instead, it operates to ensure a monopoly in a private corporation.

Additionally, the Sheriff amended his rules to cap the number of licensed nonprofit organizations who can hold Class B bingo licenses to 60. This was done knowing that the Macon County Greyhound Park already had contracts with 60 nonprofit organizations. The Sheriff stated that he imposed this limitation to comply with the Attorney General's directive to limit bingo gaming. However, the Attorney General issued no such directive. Further, the Sheriff stated that he imposed this limitation because of the demands that servicing the Macon County Greyhound Park placed on his department. The Sheriff did not limit bingo gaming at that particular facility. Instead, his limitation effectively shut out any future nonprofit organizations from obtaining Class B bingo licenses and any future corporations desiring to serve as qualified locations. The Sheriff admits that his rules and regulations have created a monopoly. This creation is not reasonably related to a legitimate state interest.

WHEREFORE, PREMISES CONSIDERED the Sheriff has overextended his rule-making authority and has created arbitrary rules and regulations. These actions have denied MCI and Reach One, Teach One equal protection under the law. The Plaintiffs respectfully request that this Court grant summary judgment in their favor.

Respectfully submitted,

/s/ Ramadanah M. Salaam-Jones
KENNETH L.THOMAS (THO043)
CHRISTOPHER K. WHITEHEAD (WHI105)
RAMADANAH M. SALAAM-JONES (SAL026)

OF COUNSEL:

THOMAS, MEANS, GILLIS & SEAY, P.C.
Post Office Drawer 5058
Montgomery, Alabama 36103-5058
(334) 270-1033
(334) 260-9396 (FAX)

GARY GRASSO

OF COUNSEL:
GRASSO DUNLEAVY, P.C.
7020 County Line Road
Suite 100
Burr Ridge, Illinois 60527
(630) 654-4500 (phone)
(630) 355-4646 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 1st day of June, 2007.

Fred D. Gray
Fred D. Gray, Jr.
GRAY, LANGFORD, SAPP,
MCGOWAN, GRAY & NATHANSON
P.O. Box 830239
Tuskegee, Alabama 36083-0239
(334) 727-4830 (phone)
(334) 727-5877 (fax)

/s/ Ramadanah M. Salaam-Jones
OF COUNSEL